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No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

MOTION FOR LEAVE TO FILE AN AMENDMENT TO MARYLAND'S ANSWER AND COUNTERCLAIM, AND AMENDMENT TO ANSWER AND COUNTERCLAIM

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MOTION FOR LEAVE TO FILE AN AMENDMENT TO MARYLAND'S ANSWER AND COUNTERCLAIM

Defendant, the State of Maryland, pursuant to Rule 17 of the United States Supreme Court, moves for leave to amend its July 31, 2000 Answer and Counterclaim to Plaintiff Commonwealth of Virginia's Bill of Complaint by adding the affirmative defense that Virginia's claims are barred by the doctrine of prescription and acquiescence. Although this Court has stated that "proposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file the initial pleadings," *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995), Maryland's proposed amendment raises nothing new in this litigation.

First, Maryland's April 21, 2000 Brief in Opposition to Virginia's Motion for Leave to File a Bill of Complaint cited this doctrine in arguing that "[i]t is too late now [for Virginia] to challenge Maryland's right to regulate the non-tidal portion of the Potomac." Br. at 23.

Second, in its Answer and Counterclaim to Virginia's Bill of Complaint, Maryland asserted the affirmative defenses of estoppel, waiver, and laches, rather than the doctrine of prescription and acquiescence, because the latter typically applies only when a State seeks to establish title, ownership, and jurisdiction over property that is in dispute, *see, e.g., New Jersey v. New York*, 523 U.S. 767, 786-87 (1998), and this Court has previously recognized that the 1632 charter from Charles I to Lord Baltimore "in unmistakable terms included the Potomac River." *Morris v. United States*, 174 U.S. 196, 223 (1899). Because Virginia does not contest ownership in this case, estoppel and waiver, rather than prescription and acquiescence, are the legal theories that control Virginia's centuries-old practice of conforming to Maryland's regulatory authority over the Potomac.

Nevertheless, Maryland has cited the doctrine of prescription and acquiescence in opposing a motion for partial summary judgment that Virginia has filed with the Special Master in which Virginia seeks a declaration that a Compact that Maryland and Virginia formed in 1785 applies to the non-tidal portion of the Potomac River where the proposed waterway construction activity underlying this suit is to occur. Disputing Virginia's claim that the Compact confers any rights in that portion of the Potomac, Maryland has argued that the doctrine of prescription and acquiescence bars Virginia from asserting such a claim. In response, Virginia has argued in its Reply Brief that Maryland has not pleaded the doctrine in its Answer and so cannot rely on it even in the context of argument at this point.

Accordingly, while Maryland does not believe it is necessary to plead the doctrine of prescription and acquiescence in its Answer, it seeks leave to do so at this early stage of the case to avoid litigating any waiver argument Virginia may raise in the future.

For the reasons stated, the State of Maryland respectfully requests leave to file an amendment to its July 31, 2000 Answer pleading the affirmative defense of prescription and acquiescence.

Respectfully submitted,

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AMENDMENT TO MARYLAND'S ANSWER AND COUNTERCLAIM

61. Maryland incorporates each and every admission, denial, and averment made by Maryland in Paragraphs 1 through 60 of its Answer and Counterclaim as though fully set forth herein. Maryland asserts separately and/or alternatively, even if inconsistent, the following affirmative defense:

EIGHTH AFFIRMATIVE DEFENSE

62. Virginia's claims are barred by the doctrine of prescription and acquiescence.

Respectfully submitted,

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